IN THE SUPREME COURT OF MISSOURI

No. SC93687

CIRCUIT CITY STORES, INC.

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

Appeal from the Administrative Hearing Commission of Missouri
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF RESPONDENT

Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
STINSON LEONARD STREET LLP
230 West McCarty Street
Jefferson City, MO 65101
Tel.: (573) 636-6263
Fax: (573) 636-6231
chuck.hatfield@stinsonleonard.com
khristine.heisinger@stinsonleonard.com

Brian R. Harris (*pro hac vice*)
AKERMAN LLP
401 E. Jackson St., Suite 1700
Tampa, FL 33602
Tel.: (813) 209-5011
Fax: (813) 218-5454
brian.harris@akerman.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF FACTS

Respondent is dissatisfied with the accuracy and completeness of Appellant's statement of facts, and therefore provides this statement of facts pursuant to Rule 84.04(f).

A. The Circuit City Private Label Credit Card Program

Circuit City was engaged in the business of selling tangible personal property at retail and was registered with the Missouri Department of Revenue (the "Department"). Circuit City was a leading retailer of consumer electronics, operated large nationwide electronics stores that sold, among other things, televisions, home theater systems, computers, camcorders, furniture, software, imaging and telecommunications products, and other audio and video electronics. Circuit City remitted sales tax to the Department based on the purchase price of taxable merchandise, including credit sales.[1]

In order to make additional sales and to make financing available to its customers so as to facilitate additional sales, Circuit City offered financing through a private label credit card program. (J.Ex. 7, pg. 7.) A private label credit card is a credit card that can typically only be used at the retail store named on the card or at certain affiliates. (J.Ex. 7, pgs. 69-70.)

Circuit City established its private label credit card program and initially operated it through First North American National Bank, a wholly owned subsidiary. On January

[1] The record on this appeal consists of the legal file ("LF"), joint exhibits ("J.Ex.") and the transcript ("Tr.") as designated.

16, 2004, Circuit City and Bank One Delaware, N.A. ("Bank One") entered into a Consumer Credit Card Program Agreement (the "Program Agreement").[2] (J.Ex. 7.) The program agreement described the purposes of Circuit City's private label credit card program: to "support sales" of Circuit City's goods and services, to "increase sales revenues" at Circuit City, to "increase and enhance" Circuit City's customer base, to "enhance … goodwill" in Circuit City's customer base. (J.Ex. 7, pg. 7.)

Contemporaneously with entering into this agreement, Circuit City sold its existing private label credit card accounts to Bank One. (J.Ex. 7, pgs. 7-8.) Bank One then began servicing the private label credit cards that Circuit City had previously issued and serviced when Circuit City solely operated its private label credit card program. Bank One also began opening new private label credit card accounts. This transition appeared seamless to the private label credit card holders, and accordingly the newly established program with Bank One appeared to be just a continuation of the program that Circuit City had previously operated on its own.

[2] Circuit City continued this relationship with JPMorgan Chase Bank NA as the successor to Bank One. (J.Ex. 2, pg. 3.) For ease of reference, Circuit City uses Bank One throughout this motion. However, unless the context clearly dictates otherwise, any such references would apply equally to JPMorgan Chase Bank NA as the successor to Bank One.

B. Both Circuit City and Bank One were Integrally Involved in the Ongoing Operation of Circuit City's Private Label Credit Card Program

The private label credit card program relationship between Bank One and Circuit City was a close, ongoing relationship that is fundamentally different than a traditional Visa or MasterCard type relationship. Initially, the parties jointly negotiated the program agreement, which was a long-term, written agreement that established and governed the operation of the Circuit City's private label credit card program. (J.Ex. 7.) The program agreement defined the relationship and responsibilities of Circuit City and Bank One with respect to the operation of the program. (J.Ex. 7, for example: pgs. 9-13.)

The program agreement included numerous terms that are not found in a traditional Visa or MasterCard arrangement. For example, Circuit City and Bank One agreed that they would develop a mutually agreed marketing plan for the program and that they would both actively market the program in accordance with that plan. (J.Ex. 7, pg. 13, 16.) A management committee comprising members from both Circuit City and Bank One was required to review the plan on at least a quarterly basis, and more often if necessary. (J.Ex. 7, pg. 16.) The parties also agreed to develop a new marketing plan each year. *Id*.

As part of their coordinated efforts to maintain a current marketing plan and actively market the program, the program agreement directed that, on a yearly basis, Bank One perform a detailed analysis of the private label credit card programs of Circuit City's competitors. (J.Ex., pg. 10.) This includes comparing "cardholder pricing and

terms, card features such as rebate/point programs or loyalty programs … preferred shopper cards …" and other items. (J.Ex. 7, pg. 10.) The analysis also included "a comparison of Internet credit card functionality, including application, approval and authorization and other factors that would support a comprehensive comparison of Circuit City's private label credit card program with its competitors' private label credit card programs." (J.Ex. 7, pg. 10.)

Circuit City and Bank One agreed to other mutually beneficial provisions. For example, the parties agreed that, from time to time, Circuit City could market its private label credit card program directly to other individuals who held other credit cards that were issued by Bank One. (J.Ex. 7, pg. 26.) Bank One agreed to periodically provide Circuit City with lists of some of its other cardholders so that Circuit City could directly market to them. (J.Ex. 7, pg. 26.) The parties also agreed to jointly administer Circuit City's rewards program. (J.Ex. 7, pg. 27.)

Circuit City and Bank One also agreed that Circuit City would accept in-store payments from cardholders. (J.Ex. 7, pg. 27.) That is, customers who wanted to make a monthly payment or some other payment against the amounts owed on their private label credit cards could do so in person at a Circuit City store. (J.Ex. 7, pg. 27.) They did not have to mail the payment directly to Bank One. Circuit City would then hold that payment in trust for the benefit of Bank One until Circuit City actually paid the money to Bank One or until the payment was netted against other amounts that Bank One owed to Circuit City. (J.Ex. 7, pg. 27.)

In order to further the coordinated operation of the program and "enhance their ability to perform the services contemplated under the Agreement," both Circuit City and Bank One agreed to provide each other with ongoing training. (J.Ex. 7, pg. 27.) Circuit City agreed to train Bank One's employees on the direction, products, merchandising and marketing of its business. *Id*. In turn, Bank One agreed to develop training materials that Circuit City could use to train its employees to "promote the Program, accept Credit Card Applications, and obtain authorizations for Purchases under the Program." *Id*. Bank One also agreed to provide "field marketing employees" that could assist Circuit City in training its employees about the program. *Id*.

Thus, although Bank One issued the private label credit cards, Circuit City was not merely a passive observer to the program. Both Circuit City and Bank One's daily participation was integral to the program's operation, and both devoted significant time and resources to its operation.

C. Circuit City Seeks a Refund of Taxes that it Previously Paid to the State

When a customer made a purchase at a Circuit City store with a Circuit City private label credit card, the customer received the merchandise and Circuit City paid the sales tax that was due on the purchase. (J.Ex. 3, pg. 5.) Bank One subsequently reimbursed Circuit City for the purchase price of the merchandise and the applicable sales tax due on the purchase, but this amount was typically adjusted in order to account for other financial obligations between the parties (e.g., discounts, rebates, etc.). (J.Ex. 7, pg. 30.)

During the operation of the Circuit City private label credit card program, cardholders defaulted on their payment obligations. (J.Ex. 8.) After attempts to collect these past due amounts, which included sales tax attributable to the amount of the unpaid taxable charges, Bank One found them to be worthless and uncollectible and deducted them as bad debts pursuant to 26 U.S.C. § 166 on its federal corporate income tax return. (J.Ex. 3, pg. 6; J.Ex. 8.)

On May 28, 2010, Circuit City filed a refund claim with the Department for a sales tax refund of $145,581. (J.Ex. 1.) Circuit City's refund claim was for accounts that were written off over the period of January 1, 2007 through April 30, 2010.

INTRODUCTION/SUMMARY OF ARGUMENT

Circuit City, like many retailers, provided financing to its customers through a private label credit card program. As described in the Statement of Facts, *supra*, Circuit City's private label credit card program was not merely a license for Bank One to paste a Circuit City logo on what would otherwise be an ordinary credit card. Quite to the contrary, Circuit City viewed its private label credit card program as the mechanism by which it would extend financing to its customers.

Circuit City initially established its own private label credit card program to extend credit directly to its customers. In 2004, Circuit City transitioned from operating that program on its own to operating in conjunction with Bank One. Pursuant to the terms of the program, Bank One issued private label credit cards to Circuit City's customers, which they used to finance purchases at Circuit City's stores. As required by Missouri law, Circuit City prepaid the sales tax on these purchases to the state.

Contemporaneously with the purchases, Bank One reimbursed Circuit City for the amounts charged to the private label credit cards. Thus, the program with Bank One was the method through which Circuit City extended credit to its customers, and it was truly a continuation of the program that Circuit City had previously operated on its own.

From the inception, Circuit City and Bank One worked together to negotiate and establish the terms of the program and thereafter to jointly operate the program. As part of this transition, Circuit City sold its existing private label credit card accounts to Bank One, and thereafter Bank One also began originating new private label credit card accounts. Circuit City's customers then used these private label credit cards to finance purchases at Circuit City's stores. As required by Missouri law, Circuit City prepaid the sales tax on these purchases to the state. Contemporaneously with the purchases, Bank One reimbursed Circuit City for the amounts charged to the private label credit cards.

Missouri law entitles sellers to seek refunds of these bad debts. Specifically, Section 144.190, RSMo, grants sellers the right to seek refunds of overpaid taxes, and a corresponding regulation, 12 CSR 10-102.100, specifically addresses credits and refunds resulting from bad debts. The regulation imposes two requirements in order for a seller to obtain a sales tax refund: (1) the sales must have been written off as bad debts; and (2) the sales must have been previously reported as taxable. Circuit City's claim meets these two requirements, and therefore it is entitled to a sales tax refund as a matter of law.

The Director opposes Circuit City's refund claim on the principal basis that Bank One, and not Circuit City, wrote off the program's bad debts. The Director admits in his brief, however, that his own regulation does not require that Circuit City be the entity that

wrote off the bad debts. (Director's Br. 10.) Instead, the Director urges this Court to judicially revise his regulation to impose that requirement. However, this Court has made clear that it "must enforce statutes as written, not as the might have been written," and that "[t]his Court cannot add language to the statute that the legislature did not include." *City of Wellston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 193 (Mo. banc 2006). Moreover, "[t]he same rules of construction are used to interpret regulations as are used to interpret statutes." *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008). Thus, even if this Court were to look past the plain language of the Director's regulation, it must still uphold the Commission's decision.

For example, this Court has also stated that while tax exemption statutes are "strictly but reasonably (so as not to curtail the intended scope of the exemption) construed," those provisions "are to be given a reasonable, natural, and practical interpretation in the light of modern conditions in order to effectuate the purpose for which the exemption is granted." *St. John's Mercy Hosp. v. Leachman*, 552 S.W.2d 723, 725 (Mo. banc 1977); *Barnes Hosp. v. Leggett*, 589 S.W.2d 241, 244 (Mo. banc 1979); *Barnes Hosp. v. Leggett*, 646 S.W.2d 889, 893 (Mo. App. 1983). In this case, Circuit City's refund is in accord with the very purpose behind the regulation.

Collecting sales tax on the purchase price that is actually paid is the foundation of Missouri's sales tax system, and providing sales tax refunds to sellers following credit defaults advances this principle. The statute and regulation therefore serve a clear purpose: to ensure that the state collects sales tax on the price that the purchaser actually paid and, at the same time, to ensure that a retailer who is required to prepay sales tax on

credit purchases is not penalized if the purchaser subsequently defaults. How the purchase was financed – whether by the seller directly or through a jointly established and operated private label credit card program – in no way evokes or concerns the purpose underlying the Director's regulation.

The economic reality of the current marketplace is that retailers rarely provide direct financing to consumers anymore. Regardless of the reason for this change, whether because of the complex web of state and federal banking and other regulations that govern the issuance of credit cards or some other reason, the vast majority of retailers now extend credit through a private label credit card program that is established and operated with a finance company like Bank One. The sales tax overpayments and bad debt losses are no less real, however, simply because they occur through the course of the retailers' private label credit card programs. The Director's interpretation would exempt the vast majority of retailer-based financing from the scope of his regulation, thereby frustrating the very purpose behind it.

The Director readily admits that the plain language of his regulation does not restrict who must have written off the bad debts and therefore it authorizes Circuit City's refund claim. No principle of interpretation supports deviating from the plain language of the regulation. This Court has said on numerous occasions that it will apply statutes and regulations as they are written and not as they *might* have been written. And even if the Court were to look past the plain language of the regulation, the Commission's decision still effectuates the underlying purpose of the regulation and reaches a sensible result. Nevertheless, the Court must apply the plain language of the regulation, and it

should therefore uphold the Commission's decision and find that Circuit City is entitled to a sales tax refund as a matter of law.

ARGUMENT

I. Standard of Review

This Court must affirm the Administrative Hearing Commission's decision if it "is authorized by law and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly." *Featherston v. Director of Revenue*, 412 S.W.3d 221, 222 (Mo. banc 2013) (quoting *Street v. Director of Revenue*, 361 S.W.3d 355, 357 (Mo. banc 2012)).

This Court reviews the Administrative Hearing Commission's interpretation of revenue laws *de novo*. *Featherston*, 412 S.W.3d at 222. The Commission's findings of fact will be upheld if the findings are supported by substantial evidence on the whole record. *Id.*

II. Missouri's Statutes and Regulation Provide for Sales Tax Refunds Attributable to Bad Debts

Missouri law imposes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Section 144.020, RSMo. The sellers are required to file sales tax returns and remit the sales tax. 12 CSR 10-104.030. Moreover, Missouri law requires that sellers pay the full sales tax upfront to the state even on credit transactions where there is no assurance that the customer will pay all, or even any, of the purchase price and sales tax that was financed on the customer's private label credit card. 12 CSR 10-103.555. If the

purchasers subsequently default, then the state has collected sales tax on a purchase amount that was never actually paid.

A. The Director's Regulation Expressly Authorizes Refunds of Sales Taxes that were Overpaid as a Result of Credit Card Bad Debts

The Legislature and the Director both recognize this inequity, and they have jointly provided a statutory and regulatory remedy. Section 144.190, RSMo, permits sellers to claim refunds of sales taxes that are "erroneously or illegally collected." This Court has previously held that section 144.190 is a waiver of the state's sovereign immunity and that it provides a mechanism by which taxpayers can reclaim taxes that were erroneously or illegally collected. *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. banc 1975).

The Director agrees in his brief that sales taxes paid to the state at the time of purchase on financed transactions are "erroneously" paid as a result of subsequent bad debts and therefore subject to refund. (Director's Br. 9.) Indeed, the Director has promulgated a regulation that specifically authorizes the refund of sales taxes attributable to bad debts. 12 CSR 10-102.100. The Director's regulation provides, in part, that:

> (1) In general, a seller may file for a credit or refund within the three-year statute of limitations when sales are written off as bad debts.
>
> (2) Definition of Terms.
>
> (A) Bad debt is a sale that has been written off for state or federal income tax purposes. In order to qualify for a bad debt deduction for sales or use tax purposes, a sale must have been previously reported as taxable.

(B) Accrual or gross sales reporting method means a seller reports the sale and remits the tax at the time of the sale. The receipts are not received from the buyer until a later date. Therefore, a timing difference occurs between the time that the sale, with applicable sales tax, is reported to the state and the time that the seller receives payment from the buyer.

(3) Basic Application of the Law.

(A) A seller may file for a refund or credit within the three-year statute of limitations for those sales written off as bad debts if the sales were reported using the accrual or gross sales method. This period is calculated from the due date of the return or the date the tax was paid, whichever is later.

(B) If a bad debt credit or refund is given and the debt is later collected, that amount must be reported on the next return as a taxable sale.

12 CSR 10-102.100.

B. Circuit City Meets the Requirement of the Director's Regulation, Which Does Not Require that any Particular Entity Have Written Off the Bad Debt

The Director acknowledges in his brief, as he must, that his regulation does not require that Circuit City be the entity that wrote off the bad debts. (Director's Br. 11.) The Director admits that the regulation "does not expressly restrict 'bad debt' to debt written off by Circuit City as the seller." (Director's Br. 11.) The regulation provides that "a seller may file a credit or refund within the three-year statute of limitations when sales

are written off as bad debts." 12 CSR 10-102.100(1). It also defines "bad debt" as "a sale that has been written off for state or federal income tax purposes." 12 CSR 10-102.100(2)(A).

Nowhere in the language of the regulation, however, is any requirement that the seller must have written off the bad debt. This is not surprising because the requirement that the bad debts have been written off was never meant to impose a substantive requirement that a particular entity must have written off the bad debts. Rather, the bad debt write-off provision was intended to dictate the timing of the retailer's sales tax refund or credit. That is, a retailer was not entitled to immediately obtain a refund or credit at the first moment the customer did not pay the financed amounts. Instead, the retailer had to wait until the charges were written off for income tax purposes.

Under the plain language of the regulation, Circuit City is entitled to a refund if Circuit City previously reported the sales as taxable and if the sales were written off as bad debts. 12 CSR 10-102.100. And there is no factual dispute that Circuit City's claim meets these two requirements. Because the language of the regulation is clear, there was nothing more for the Commission to do than simply apply the language of the regulation to the facts of this case. *See Hyde Park Hous. P'ship v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) ("The primary rule of statutory construction is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning."); *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013) ("When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.") (internal quotations omitted); *State ex rel. Evans*, 254 S.W.3d at 35 ("The same

rules of construction are used to interpret regulations as are used to interpret statutes."). Indeed, no further interpretation or analysis of the regulation is even permissible.

Nevertheless, after recognizing that its regulation does not specify who must have written off the bad debts, the Director attempts to manufacture issues of statutory interpretation where no such issues exist. First, the Director attempts to frame the issue of this case as one regarding the extent to which the State has waived its sovereign immunity. (Director's Br. 12.) As the Director describes, "the entitlement to a refund is a waiver of sovereign immunity" and the "question of who can obtain a refund is purely one of the statute that waives immunity." (Director's Br. 12.)

This purported issue is of no moment. Missouri's refund statute allows sellers to claim refunds of taxes that are "erroneously" collected. Section 144.190, RSMo. This refund statute is an express waiver of the state's sovereign immunity, thereby permitting Circuit City to seek a refund of any taxes that were erroneously collected. *See Charles*, 524 S.W.2d at 823 (finding that Section 144.190, RSMo is a waiver of the government sovereign immunity). There is absolutely no dispute that the State has waived its sovereign immunity and that that Circuit City has a statutory right to seek a sales tax refund.

The Director defined the parameters of these erroneously collected taxes in his regulation, and in doing so he has not required that Circuit City be the entity that has written off the bad debts. 12 CSR 10-102.100. He has only required that the seller have previously reported the sale as taxable. *Id*. On this point, the Director attempts to have the Court eschew the plain language of the regulation and instead have this Court insert a

judicially imposed requirement that Circuit City have been the entity that wrote off the bad debts. However, Missouri law does not permit judicial modification of a valid statute or regulation.

As this Court has previously explained, it is not its role to pass judgment on which legislative schemes might have been the best or most logical choices. *City of Wellston*, 203 S.W.3d at 192; *see also Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010) ("Moreover, it is not within the Court's province to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination.") (internal quotations omitted).

Rather, "[t]his Court must enforce statutes as written, not as they might have been written." *City of Wellston*, 203 S.W.3d at 192. "This Court cannot add language to the statute that the legislature did not include." *Id.*; *see also Turner*, 318 S.W.3d at 668 ("Accordingly, the Court cannot supply what the legislature has omitted from controlling statutes."). As this Court so eloquently described: "The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Board of Educ. of the City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001). Such cannons must apply with equal force to the state's regulations. *State ex rel. Evans*, 254 S.W.3d at 35. Therefore, this Court must reject the Director's attempts to judicially insert a requirement that the Circuit City be the entity that wrote off the bad debts.

C. Missouri Law Views the Combination of Circuit City and Bank One as a Single "Seller" and Whether Circuit City Incurred Bad Debts Itself is Legally Irrelevant

The Commission's decision is additionally correct when the language of the regulation is read together with the applicable statutory definitions. Under Missouri law, a "seller" is defined as "a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed pursuant to section 144.020." Section 144.010(12), RSMo (emphasis added). Missouri law in turn defines "person" as:

> (7) "Person" includes any individual, firm, copartnership, joint venture, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency, except the state transportation department, estate, trust, business trust, receiver or trustee appointed by the state or federal court, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

Section 144.010(7), RSMo (emphasis added).

Thus, the statutory definition of "seller" is not limited to a single entity, such as only Circuit City, but also includes any group or combination acting as a unit. That is, it includes the combination of Circuit City and Bank One. Therefore, if Circuit City did not arguably qualify for a refund in its own right pursuant to 12 CSR 10-102.100, then it

certainly does when the regulation is read in conjunction with the statutory definition of "seller," which views Circuit City and Bank One as a single "seller."

The Director's regulation likewise uses the term "seller." It begins by providing that "a seller may file for a credit or refund within the three-year statute of limitations when sales are written off as bad debts," and it continues to use that term throughout the regulation. 12 CSR 10-102.100(1). The Director does not separately define "seller" in its regulation. Indeed, the subsection titled "(2) Definition of Terms" only defines "bad debt" and "accrual or gross sales reporting method." 12 CSR 10-102.100(2).

By porting the term "seller" into his regulation, the Director brought along with that term its statutory definition. Indeed, it would make little sense for the Director to define "seller" in the regulation when that term is already defined in the statutes. And although within his power to do so, it would make even less sense for the Director to define the term "seller" differently in regulation than in the statute. Regardless, it is clear that the Director made no attempt to alter the statutory definition of seller. It has exactly the same meaning in the regulation as it has in the statute, and under the statute it is defined to include a "group or combination acting as a unit."

There is no doubt that the regulation permits a refund where Circuit City makes the sales and were Bank One writes off the bad debts. The Director admits in his brief that the regulation does not dictate who must have written off the bad debt. However, even if the Court were to judicially rewrite the regulation in the manner advocated by the Director to require that the "seller" have written off the bad debt, the Commission's

decision is still correct because Circuit City and Bank One collectively constitute the "seller" that is entitled to the bad debt refund.

That is, even assuming *arguendo* that the Department's regulation did require that the "seller" have written off the bad debts, that still does not require that Circuit City have written off the bad debts. The term "seller," as used in the regulation, means the combination of Circuit City and Bank One. Even with Bank One writing off the bad debts, the collective "seller" has still fulfilled both requirements of the regulation and therefore Circuit City is entitled to the sales tax refund.

The Commission's decision correctly applies these statutory definitions. First, the Commission correctly recognized that "Circuit City is a corporation that fits the definition of person when acting alone." (LF 39.) Because of this statutory definition, the Commission also correctly held that "Circuit City and the PLCC Bank, acting as a unit, fit the definition of 'person'" and that "there is no dispute that Circuit City and the PLCC Bank, acting as a unit, was a person that fits the definition of 'seller.'" (LF 39.)

As such, the Commission's ultimate conclusion, that Circuit City is entitled to its refund, is also correct:

> …As a seller, Circuit City and the PLCC Bank, acting as a unit, qualify for a sales tax refund under 12 CSR 10-102.100(3)(A), if they meet the two requirements of this regulation: that it reported and remitted sales tax at the time of the sale and the sales were written off as bad debts.

> Circuit City reported and remitted sales tax at the time of the sale. The PLCC Bank wrote off some of these sales as bad debts. Both Circuit City and the PLCC Bank, acting as a unit, are a person. As such, they are a seller that is entitled to a sales tax refund on overpaid sales taxes under 12 CSR 10-102-100(3)(A).

(LF 39.)

Therefore, even with the judicial revisions that the Director advocates, the Commission's decision is still consistent with the statutory scheme established by the Missouri Legislature and Circuit City would still be entitled to a refund. [3]

[3] The Director cites *Central Cooling & Supply Co. v. Director*, 648 S.W.2d 546 (Mo. 1983) and alleges that it precludes Circuit City and Bank One from being viewed as a single taxpayer unit pursuant to the statutory definition of "person." While the facts are not well developed in the opinion, it appears that Central Cooling paid sales taxes to Kansas on out of state purchases and faced sales tax a second time on an intercompany sale of the items to its parent corporation. *Id*. at 549. Central Cooling attempted to use the statutory definition to escape any taxation whatsoever on an otherwise taxable transfer. In contrast, Circuit City fully paid the sales taxes that were due and is simply trying to obtain the protection of the Department's bad debt regulation. Given the significant factual differences, *Central Cooling* seems to have little application in this case.

III. Even if the Court Looked Past the Plain Language of the Regulation, Other Basic Principles of Statutory Interpretation Still Require that the Director Refund the Taxes the Circuit City Overpaid

The Commission's decision granting Circuit City's refund claim not only correctly interprets the Director's regulation, but it also reaches a reasonable and equitable result. Therefore, if the Court were inclined to look past the plain language of the Director's regulation, the Commission's ruling is still in accord with other basic principles of statutory interpretation that might then apply.

The starting, and often ending, point of statutory and regulatory interpretation is the plain language of the statute. This Court has directed that it "will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result." *Bateman*, 391 S.W.3d at 446. In this case, Circuit City seeks a refund of sales taxes that it previously paid to the State, and as described in Section II(B), *supra*, the regulation does not require that Circuit City have written off the credit card program's bad debts. Granting Circuit City's refund claim in such a circumstance can hardly be termed "absurd or illogical," and therefore there is no reason to look past the plain language of the regulation.

However, if one were to examine other factors that might bear on the interpretation of the Director's regulation, the Court has previously directed that while the general rule is that tax exemptions, "though not subject to extension by construction or implication, are to be given a reasonable, natural, and practical interpretation in the light of modern conditions in order to effectuate the purpose for which the exemption is

granted." *Barnes Hosp.*, 589 S.W.2d at 244; *Barnes Hosp.*, 646 S.W.2d at 893 (emphasis added). This Court has also directed that "[w]hen determining the merits of revenue cases, it is important to look beyond legal fictions and academic jurisprudence in order to discover the economic realities of the case." *Scotchman's Coin Shop, Inc. v. Administrative Hearing Comm'n*, 654 S.W.2d 873, 875 (Mo. banc 1983). Deciding whether an exemption applies to a taxpayer also depends on the specific circumstances and economic realities pursuant to which the exemption is claimed. *Barnes Hosp.*, 646 S.W.2d at 893 ("[E]ach tax exemption case is peculiarly one which must be decided upon its own facts, turning upon the particular records presented.").

Here, it is easy to discern the purpose of the Department's regulation. For cash transactions, sales tax is computed based on the amount that the purchaser actually pays for the merchandise. The state does not set the sales price of merchandise; it simply collects sales tax based on whatever price is actually paid by the purchaser. This is the underlying principle of Missouri's sales tax system and that of most other states too. On credit transactions, Missouri law requires that retailers prepay sales tax. However, there is no guarantee that the purchaser will ultimately pay the financed purchased price. When a purchaser subsequently defaults without paying the full amount of the purchase price, the result is that the state has collected sales tax on an amount that was more than what the purchaser actually paid.

The Director's regulation reforms this transaction to be consistent with the underlying principle of the state's sales tax system – that the state only collect sales tax on the purchase price that is actually paid. Conversely, interpreting 12 CSR 10-102.100 to

deny Circuit City a sales tax refund would be at odds with the purpose of the regulation and would result in the state keeping sales taxes computed on amounts that the purchasers never ultimately paid. That is the antithesis of the entire basis of Missouri's sales tax system. The regulation was designed to further the principle of permitting the state to only collect sales tax on the price actually paid, and permitting Circuit City to obtain a refund furthers that purpose.

Allowing Circuit City to obtain a refund also recognizes the economic reality that retailers have largely moved away from offering financing directly, and instead they largely make financing available to their customers through private label credit card programs. There is no dispute that Circuit City would be entitled to a refund under 12 CSR 10-102.100 if it had financed the transactions itself. Indeed, Circuit City initially operated its own private label credit card program through First North American National Bank, a wholly owned subsidiary and a separate legal entity.

During the time that Circuit City operated its own private label credit card program, it claimed these bad debt deductions and was entitled to receive them. However, a growing web of complex federal regulations and other consideration pushed Circuit City to adopt the same course as so many others in the industry – to operate its private label credit card program with Bank One. Now, instead of running the private label credit card program through a separate subsidiary, it has shifted that component of the program to Bank One.

Circuit City should be no less entitled to a refund simply because it operated its private label credit card program in conjunction with Bank One rather than running by

itself. The nature of the financing does nothing to alter the state's interest in only collecting sales tax on the price actually paid. There is simply no compelling reason to treat purchases financed directly by the retailer differently than purchases financed through private label credit card programs.[4]

The end result of the Director's interpretation would be to exempt the vast majority of retailer-based financing from the scope of 12 CSR 10-102.100, thereby rendering the protection of the regulation wholly illusory to most retailers. Such an interpretation is not only manifestly unjust but it is also contrary to the law. It ignores the economic reality that most retailers now operate their programs with a financing company. The Commission's decision, however, is not only consistent with the plain language of the Department's regulation but also recognizes the economic realities of the modern retail industry.

[4] The close knit nature of the private label credit card programs, including this type of income and loss sharing, differentiates them from the traditional Visa and MasterCard type relationship that does not possess those same qualities. Thus, the Commission's decision in this case does not necessitate or even imply that such claims would be permissible for ordinary credit card bad debts. The decision is confined to private label credit card debt, and correctly so.

IV. While the Cases Cited by the Commission From Other States Might be Instructive, Circuit City's Claim Will Be Decided Under Missouri Law

In its decision, the Commission undertook a detailed review of numerous cases across the country addressing tax refund claims by lenders and retailers for sales tax refunds attributable to bad debts on private label credit cards or other financed transactions. The Commission found that most of these cases were not relevant – either because they involved claims brought by the lenders (instead of the retailers) or because the states' statutes and regulations were not similar enough to Missouri law to provide any guidance. (LF 18-39.) The Commission found two cases, one from Arizona and one from Michigan, that it believed might provide some guidance. *Home Depot USA v. Arizona Dep't of Revenue*, 287 P.3d 97 (Az. Ct. App. 2012); *Home Depot USA, Inc. v. State of Michigan*, 2012 WL 1890219 (Mich. Ct. App. May 24, 2012) (UNPUBLISHED), leave to appeal denied.[5]

Between these two cases, the Commission found that the Michigan case, which upheld a retailer's right to sales tax refunds attributable to bad debts on its private label credit card program, was more persuasive. (LF 37-39.) The Director did not discuss these cases in his opening brief. It is unclear whether the Director believes that they are

[5] A subsequent panel of the Michigan Court of Appeals has since reached the opposition result, and an application for leave to appeal is currently pending with the Michigan Supreme Court. *Menard, Inc. v. Department of Treasury*, 302 Mich.App. 467, 2013 WL 4863990 (Mich. App. 2013).

not applicable in this case or whether he is simply saving any discussion for his reply brief. In any event, while these cases may be a guide, it is clear that this case will largely be decided under Missouri law.

V. Conclusion

Both Circuit City and the Director agree that Missouri's bad debt statute and corresponding regulation do not impose any requirement that Circuit City have been the entity that wrote off the bad debts. Circuit City is therefore entitled to a refund under the plain language of the regulation, and well settled principles of statutory interpretation do not permit this Court to look past its plain language. There is simply no legal justification for the Director's position, which would have the Court engage in a judicial revision of the regulation and effectively insert additional language purporting to require that Circuit City be the entity that wrote off the bad debts.

Not only is the Commission's decision consistent with the plain language of the regulation, but it is also consistent with the statutory definition of "seller," which includes a "group or combination acting as a unit." The Director ported the term "seller" into his regulation. Thus, even if the regulation required that the "seller" write off the bad debts, that term includes the combination of Circuit City and Bank One. That is, the regulation views Circuit City and Bank One as a collective "seller," and Circuit City is entitled to a refund regardless of whether Circuit City or Bank One writes off the bad debts.

Moreover, even if the Court were to look past the plain language of the regulation, granting Circuit City's refund recognizes this Court's prior direction that tax statutes must be interpreted in light of modern conditions and to effectuate the purpose behind the

statute. Refunding these overpaid taxes to Circuit City ensures that the state has only collected sales tax on the purchase price that is actually paid. It also recognizes the reality that most larger retailers no longer run their own private label credit card programs.

The Director's interpretation fails to recognize the purpose behind the statute and would exempt a large number of retailers from the protection that the statute was designed to provide. Such an interpretation is not only contrary to the language of the regulation, but it is unjust. Accordingly, Circuit City requests that the Court uphold the Commission's decision and find that Circuit City is entitled to a sales tax refund in the amount of $145,581, plus applicable interest.

Respectfully submitted,

/s/ Khristine A. Heisinger

Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
STINSON LEONARD STREET LLP
230 West McCarty Street
Jefferson City, MO 65101
(573) 636-6263
(573) 636-6231 (facsimile)
chuck.hatfield@stinsonleonard.com
khristine.heisinger@stinsonleonard.com

and

Brian R. Harris (*pro hac vice*)
AKERMAN LLP
401 East Jackson Street
Suite 1700
Tampa, FL 33602
(813) 223-7333
(813) 218-5454 (facsimile)
brian.harris@akerman.com

ATTORNEYS FOR CIRCUIT CITY STORES, INC.

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri Case.Net, on March 26, 2014, upon:

James R. Layton
Solicitor General
ATTORNEY GENERAL'S OFFICE
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov

and that a true and correct copy of the foregoing was mailed, U.S. Mail, First Class postage prepaid, to:

Administrative Hearing Commission
P.O. Box 1557
Jefferson City, MO 65102-1557

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 7,483 words.

/s/ Khristine A. Heisinger
Attorney